

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

APR 23 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of
MARTHA J. HUBER, et al.

MM Docket No. 93-51

File Nos. BPH-911114ME,
et al.

For Construction Permit for a
New FM Station on Channel 234A
in New Albany, Indiana

TO: Honorable Richard L. Sippel
Administrative Law Judge

REPLY TO OPPOSITION TO MOTION TO DISMISS

Martha J. Huber (Huber), by her attorneys, and pursuant to Section 1.294(c)(3) of the Commission's rules, now replies to the "Opposition to Motion to Dismiss" filed by Adams Rib, Inc. and dated April 19, 1993 but served April 20, 1993.

In her motion, Huber sought to have Adams Rib's application dismissed for failure to timely file a notice of appearance and for not submitting an integration statement or document production as required by Section 1.325(c) of the Commission's rules. Adams Rib accuses Huber of making untrue statements. In fact, it is Adams Rib's opposition that contains material misrepresentations. Adams Rib has consistently failed to file or to exchange documents in a timely manner, and its conduct has disrupted the proceeding and prejudiced the other applicants. Its application must therefore be dismissed.

The first misrepresentation in the Adams Rib opposition is the statement that its appearance "was filed with the Secretary of the Federal Communications Commission on April 2,

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1993." As reflected in the motion to dismiss, Huber had checked the Commission's docket records just before filing the motion on April 16, and there was no indication that the Adams Rib appearance had been filed. Before receiving the Adams Rib opposition on April 22,¹ Huber checked again and discovered that the Adams Rib appearance had been filed not on April 2 but on April 6, which was after the April 5 deadline for notices of appearance. A copy of the notice with the Commission's file stamp is submitted as Attachment 1 to this supplement. The notice indicates that it was received by the Commission's mail room on April 6, although it did not reach the Secretary's office until April 13.

Adams Rib's late filing of its notice of appearance requires the dismissal of its application. Section 1.221(c) of the Commission's rules states:

Where an applicant fails to file such a written appearance within the time specified,... or a petition to accept, for good cause shown, such written appearance beyond expiration of said 20 days, the application will be dismissed with prejudice.

In this case, Adams Rib did not file a timely appearance or a petition to accept its late-filed appearance. Indeed, it has

¹ Huber had intended to file a supplement to the motion to dismiss to provide this information as well as attempting to

misrepresented when its notice was filed. Its application must therefore be dismissed.

Good cause does not exist for accepting Adams Rib's late filed appearance. Absent very unusual circumstances such as natural disasters, an applicant bears absolute responsibility for assuring that documents are filed on time with the Commission. FCC Overrules Caldwell Television Associates, Ltd., 58 RR 2d 1706 (1985). If the notice was prepared on April 2, the date indicated by Adams Rib, the applicant could have easily complied with the Commission's rules by using an air express service. Its failure to do so is inexcusable. Moreover, the Hearing Designation Order gave Adams Rib more than adequate warning that a notice had to be filed within twenty days.

The second misrepresentation by Adams Rib is the claim of Mary L. Smith that:

On April 9, 1993, I filed an "Integration and Diversification Statement" with Judge Sippel and sent a copy to each applicant's attorney. The 'Standard Document Production' was included in the envelope to each of the attorneys [sic].

As reported in Huber's motion, no such document had been received by April 16. On April 19, the documents did arrive. The "Integration and Diversification Statement" (Attachment 2 to this reply) contains a certificate of service by Mary L. Smith indicating that the pleading was mailed on April 9. That representation is blatantly false. The envelope in which the documents were received (a copy of which is submitted as

Attachment 3 to this reply) indicates that the package was not mailed until April 13, which was after the deadline for filing the integration statement with the Commission. The integration statement was required to have been filed and served by, at the latest, April 12, or five days after notices of appearance were due. Prehearing Conference Order, FCC 93M-114 (released March 19, 1993). Adams Rib's certificate of service is thus defective and its pleading statements are clearly misrepresentations made in an attempt to make it appear that pleadings were filed on time. Moreover, as of the morning of April 23, the Adams Rib integration statement has not appeared in the Commission's docket records for this proceeding. Huber has checked with William Caton of the Secretary's Office. Mr. Caton had no recollection of seeing the pleading. He believes that if the pleading was mailed to the Commission's mailroom, it may have been sent to the FM Branch instead of his office because the pleading had no

applicants, which were filed on April 9. It would be patently unfair to allow Adams Rib to submit its integration statement after it has had the opportunity to review the integration statements of the other applicants. Adams Rib's document production did not comply with the Commission's standard document production rule, because no financing documents or transmitted site documents were produced. See Section 1.325(c)(1)(v) and (vi) of the Commission's rules. Clearly, Adams Rib's conduct has prejudiced the other applicants and disrupted the proceeding. Its repeated misrepresentations demonstrate that it does not have the truthfulness or reliability required of a Commission licensee.

In reviewing whether an applicant was properly dismissed from a comparative proceeding, the reviewing authority primarily looks at:

the applicant's proffered justification for the failure to comply with the presiding officer's order, the prejudice suffered by other parties, the burden placed on the administrative system, and the need to punish abuse of the system and to deter future misconduct.

Comuni-Centre Broadcasting, Inc. v. FCC, 856 F.2d 1551, 1554, 65 RR 2d 457, 459 (D.C. Cir. 1988). In this case, an explicit Commission rule clearly requires dismissal, and all of the factors noted above support Adams Rib's dismissal. First, instead of attempting to explain its late filings, Adams Rib has repeatedly misrepresented facts in an attempt to make it appear that it filed on time. No justification has even been offered for its actions. Second, Adams Rib's conduct has

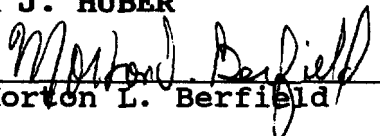
prejudiced the other applicants by disrupting discovery and by possibly giving Adams Rib an unfair tactical advantage. Third, Adams Rib's conduct has burdened the administrative system by engendering confusion about the status of its application and disrupting the procedural schedule established by the Presiding Judge. Finally, Adams Rib's repeated misrepresentations about the filing and service of documents clearly represent serious abuses of the Commission's processes that must be punished. Obviously, it would not serve the public interest to allow an applicant to avoid having its application dismissed by making false claims as to when documents were filed or served.

Accordingly, Huber requests that the application of Adams Rib, Inc. (File No. BPH-111115MA) be dismissed.


Respectfully submitted,

MARTHA J. HUBER

By


Morton L. Berfield

By


John J. Schauble

Cohen and Berfield, P.C.
1129 20th Street, NW, #507
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(202) 466-8565

Its Attorneys

Date: April 23, 1993

Docket 230

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ADAMS RIB, INC.

P.O. BOX 1226

JEFFERSONVILLE, IN

47131

APRIL 2, 1993

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AUDIO SERVICES
DIVISION

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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APR 6 1993

FCC MAIL ROOM

THE SECRETARY
FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET, N.W., ROOM 222
WASHINGTON, DC 20554

93-51

FM BRANCH

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ATTN: Mrs. Donna R. Searcy

On behalf of Adams Rib, Inc., an applicant the FCC (File No. BPH-911115Ma) for a construction permit for a new FM broadcast station on Channel 234A at New Albany, IN, submit the following statement of appearance.

Pursuant to Section 1.221(c) of the Commission's Rules, I will appear, in person, on May 18, 1993 at 9:00 a.m. for the prehearing conference; and again on August 10, 1993 at 10:00 a.m. for the hearing proceeding at the Offices of the Commission in Washington, D.C.

This statement is filed in response to Hearing Designation Order MM Docket No. 93-51, adopted March 3, 1993 and Released on March 15, 1993.

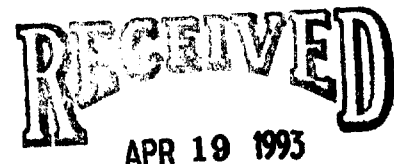
Should there be any questions concerning this filing, please communicate with the undersigned.

Very truly yours,

Mary L. Smith
PRESIDENT

cc: Chief, Data Management Staff
Audio Services Division
Mass Media Bureau
Room 350

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

COHEN & BERFIELD

In re Applications of)	
)	
MARTHA J. HUBER)	File Nos. BPH-911114ME
ADAMS RIB, INC.)	File No. BPH-911115MA
RITA REYNA BRENT)	File No. BPH-911115MC
MIDAMERICA ELECTRONICS SERVICE, INC.)	FILE NO. BPH-911115ML
STATON COMMUNICATIONS, INC.)	File No. BPH-911115MU
)	
For Construction Permit for a)	
New FM Station on Channel 234A)	
in New Albany, Indiana.)	
)	

To: Honorable Richard L. Sippel
Administrative Law Judge

INTEGRATION/DIVERSIFICATION
STATEMENT OF ADAMS RIB, INC.

Adams Rib, Inc. is a corporation in the State of Indiana. Mary L. Smith is the President and holds 50% of the voting stock. Mary's daughter, Angelia M. Pait is the Sect-Treas. and also holds 50% of the voting stock.

Ms. Smith will work full time, 8 hours per day, 5 days per week, for a minimum 40 hour week as the station General Manager. Ms. Pait will also work full time, 8 hours per day, 5 days per week, for a minimum 40 hour week as the station Business Manager. Both Ms. Smith and Ms. Pait shall terminate any employment in order to fulfill their full-time commitment at the new station.

Ms. Smith will divest of all present ownership in any broadcast station or other medium of mass communication. Ms. Pait does not hold any interest in any broadcast station or other medium of mass communication.

Ms. Smith and Ms. Pait shall claim any qualitative enhancement credit to which the female gender is entitled. Both shall claim qualitative enhancement credit for local residence and civic and community activities. Ms. Smith has resided at 2711 Highway 62, Jeffersonville, Indiana since February 1977. It is located within the coverage contour of the new station. Ms. Pait was born in Jeffersonville, Indiana where she resides since Feb. 1977.

Ms. Smith is an Evangelist and founded Brightness Ministries, Inc. which operates LPTV station W05BE at Jeffersonville which has been on-the-air for six years. The station operates as a non-profit educational station and produces many hours of local programming each week. Ms. Smith has Produced many of the programs broadcast over the station. She has also served as a Pastor and as a prayer chaplain in the ministry.

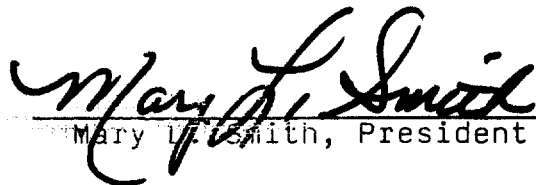
Ms. Pait is a business college graduate and has worked for local telephone companies and local banks. She grew up in the broadcast business and has worked as a control room operator and announcer in the family owned stations. She works with a local food distribution program to feed street people.

Adams Rib, Inc. will install emergency power generators at the studio and transmitter sites and will seek credit for this proposal.

ADAMS RIB, INC.

Date:

4-9-93


Mary L. Smith, President

CERTIFICATE OF SERVICE

I, Mary L. Smith, do hereby certify that the foregoing
"Integration and Diversification Statement" was mailed, postage
pre-paid, this 9th day of April, 1993 to the following:

The Honorable Richard L. Sippel
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W., Suite 214
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Arlington, VA 22203-1633
(Counsel for Rite Source, Inc.)

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P.O. Box 1226
JEFFERSONVILLE, IN
47131-1226

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WASHINGTON D.C.
20036



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COHEN & BERFIELD

CERTIFICATE OF SERVICE

I, Susie Cruz, do hereby certify that on the 23rd day of April 1993, a copy of the foregoing "Reply to Opposition to Motion to Dismiss" was sent first-class mail, postage prepaid to the following:

James Shook, Esq.*
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Susie Cruz

* Hand Delivered